140-701

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 359.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM BALL, HENRY M. DANIEL, AND W. S. POWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED APRIL 27, 1888.

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1 In the Supreme Court of the United States.

THE UNITED STATES
vs.
WILLIAM BALL, HENRY M. DANIEL, AND W. S. Powell. } No. 1351.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honorable Matthew P. Deady, one of you, between The United States, plaintiff and plaintiff in error, and William Ball, Henry M. Daniel, and W. S. Powell, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this February 15, 1888.

[SEAL.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon.
By R. B. LAMSON,
Deputy Clerk.

(Indorsed:) In the Supreme Court of the United States. The United States vs. William Ball, Henry M. Daniel, and W. S. Powell, writ of error.

2 In the Supreme Court of the United States.

THE UNITED STATES
vs.
WILLIAM BALL, HENRY M. DANIEL, AND W. S. Powell. } No. 1351.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honor-

able Matthew P. Deady, one of you, between the United States, plaintiff and plaintiff in error, and William Ball, Henry M. Daniel, and W. S. Powell, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this February 15, 1888.

[Seal of U. S. circuit court.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States
for the District of Oregon.
By R. B. LAMSON,
Deputy Clerk.

(Indorsed:) 1351. In the Supreme Court of the United States. The United States vs. William Ball, Henry M. Daniel, and W. S. Powell. Writ of error.

3 DISTRICT OF OREGON, *ss:*

I certify that on the 24th day of February, 1888, at North Yamhill and Portland, in said district, I duly served the within citation on writ of error upon the therein named William Ball, Henry M. Daniel, and W. S. Powell, delivering to each one personally a true copy of said citation on writ of error duly certified to by me as U. S. marshal.

JOHN MYERS,
United States Marshal.
By CHAS. N. WAIT,
Deputy.

4 UNITED STATES OF AMERICA,
District of Oregon, ss:

To William Ball, Henry M. Daniel, and W. S. Powell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October, A. D. eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein The United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why

the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this February 16, 1888.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Indorsed:) No. 1351. U. S. circuit court, district of Oregon. The United States vs. William Ball, Henry M. Daniel, and W. S. Powell. Citation on writ of error. Filed Feb. 25, 1888. R. H. Lamson, Clerk.

5 In the circuit court of the United States for the district of Oregon, October term, 1886.

Be it remembered, that on the 24th day of January, 1887, there was duly filed in the circuit court of the United States for the district of Oregon, a complaint in words and figures as follows, to wit:

6 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL, HENRY M. DANIEL, WILLIAM S. Powell.

Complaint.

Comes the plaintiff above named, by Lewis L. McArthur, the attorney thereof for the district of Oregon, and complaining of the above-named defendants, alleges the following facts constituting its cause of action:

That on the first day of January, A. D. 1884, and on divers other days between said day and the first day of January, A. D. 1887, one John W. Green, unlawfully and willfully, and without the consent or license of the plaintiff, entered upon the northeast quarter of the northeast quarter and the southeast quarter of the northwest quarter of section thirty, township two south, range five west, of the Willamette meridian, in Yamhill County, State and district of Oregon, the same being then and there public lands of the United States, and did then and there unlawfully and wrongfully, and with intent to dispose of the same, cut and remove and cause and procure to be cut and removed therefrom a large amount, to wit, two million, seven hundred and fifty thousand feet of timber then and there growing and being on said land, and did then and there cut and manufacture said timber, so cut and removed as aforesaid, then and there being the property of the plaintiff into saw-logs, and did then and there transport and remove and cause and procure to be
7 transported and removed all of said saw-logs, so unlawfully cut and removed as aforesaid, to a certain saw-mill owned and operated by the defendants in Yamhill County, State and district aforesaid. That the said defendants then and there, well knowing that the said saw-logs were the property of the plaintiff and had been manufactured from timber cut and removed from the lands of the plaintiff as aforesaid, did then and there wrongfully and unlawfully take possession of the same and convert

the whole thereof to their (defendants') own use, to the damage of the plaintiff in the sum of eight thousand two hundred and fifty dollars.

Wherefore the plaintiff prays judgment against the defendants for the full sum of eight thousand two hundred and fifty dollars, together with the costs and disbursements of this action.

LEWIS L. MCARTHUR,
United States Attorney.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn, upon my oath say that the foregoing complaint is true, as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this January 24, 1887.

R. H. LAMSON,
Clerk.
By R. B. LAMSON,
Deputy.

(Endorsed:) Filed Jan. 24, 1887. R. H. Lamson, clerk.

8 And afterwards, to wit, on the 25th day of January, 1887, there was issued out of said court a summons in words and figures as follows, to wit:

9 DISTRICT OF OREGON, *ss:*

I hereby certify that on the 7th day of Feb., 1887, at La Fayette, Yamhill County, in said district, I duly served the within summons upon the therein-named William Ball and Henry M. Daniel, by delivering to them personally, a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled action, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal.
By P. A. MARQUAM, Jr.,
Deputy.

10 DISTRICT OF OREGON, *ss:*

I certify that on the 2d day of Feb., 1887, at Portland, Multnomah County, in said district, I duly served the within summons upon the therein-named W. S. Powell, by delivering to him personally a true copy of said writ duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled action, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal.
By P. A. MARQUAM, Jr.,
Deputy.

11 In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL, HENRY M. DANIEL AND William S. Powell. } No. 1351.

Summons.

The President of the United States to William Ball, Henry M. Daniel, and William S. Powell, the above-named defendants, greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of eight thousand two hundred and fifty dollars, together with the costs and disbursements of this action.

12 And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district this 25th day of January, 1887.

[Seal of U. S. Circuit Court.]

R. H. LAMSON,
Clerk.
By R. B. LAMSON,
Deputy.

(Indorsed:) No. 1351. In the circuit court of the United States for the district of Oregon. The United States vs. William Ball, *et al.* Summons. (Original endorsed.) Returned and filed Feb'y 8, 1887. R. H. Lamson, clerk.

13 And afterwards, to wit, on the 21st day of March, 1887, there was duly filed in said court, an answer of defendants in words and figures as follows, to wit:

14 In the circuit court of the United States for the district of Oregon

THE UNITED STATES, PLAINTIFF,
vs.
WILLIAM BALL, HENRY M. DANIELS, and W. S. Powell, Defendants. } Answer.

Now come the defendants above named, and answering plaintiff's complaint herein filed, denies that

on the first day of January, A. D. 1884,
or at any other time, or on divers other
days, or any days, or between said day
and the first day of January, A. D. 1887,
or at any time, one John W. Green, un-
lawfully or wilfully, or without
the consent or license of the plaintiff,
entered upon the northeast quarter
of the northeast quarter or the south-
east quarter of the northwest quarter
of section thirty, township two south,
range five west, of the Willamette
meridian, in Yamhill County, State
of Oregon, or that said land was at said
time public lands of the United States,
or that they or either of them did then,
or at any time or place, unlawfully
or wrongfully, or with intent to dis-
pose of the same, or otherwise, cut or remove, [Page 1.]
or cause to procure or be cut or removed,
from said land, a large amount or any
logs, or two million seven hundred
and fifty thousand feet of timber, or
any timber then or there growing or being
on said land, or did then or there, or at
any time or place, cut or manufacture
said timber or any part thereof so cut
or removed as aforesaid, or that said
timber, or any part thereof, was then
or there, or at any time or place, the
property of the plaintiff, or that def'ts,
or either of them, then or there, or at any
time or place, manufactured said or
any timber of plaintiff's into saw-
logs, or did then or there, or at any
time or place, transport or remove,
or cause or procure to be transported
or removed, all or any of said saw-
logs so unlawfully cut or removed
as aforesaid to a certain or any saw-
mill owned or operated by the defendants,
or either of them, in Yamhill County,
State of Oregon, or at any place. Denies
that the said defendants, or either of them,
then or there, or at any time, knew
that the said saw-logs, or any part thereof,
were the property of the plaintiff, or [Page 2.]
had been manufactured from timber
cut or removed from the lands of
the plaintiff as aforesaid, or did then
or there, or at any time or place, wrong-

fully or unlawfully, or at all take possession of said saw logs, or any part thereof, or that they or either of them converted the whole or any part thereof to their or either of the defendants' own use, or that the plaintiff is damaged thereby in the sum of eight thousand two hundred and fifty dollars, or any sum.

And the defendants, for a further and separate answer and defense to plaintiff's cause of action, alleges and avers the following facts, to wit: That on the day of November, 1880, and prior thereto, the following-described land, to wit, the north half of the northeast quarter and the east half of the northwest quarter of section thirty, in T. 3 S., R. 5 W., in Yamhill County, State of Oregon, and containing one hundred and sixty acres of land, was unoccupied

public land of the United States and [Page 3.]
subject to homestead entry under
and by virtue of the act of Congress of May 20, 1862, commonly called the homestead law, and the acts amendatory thereof, and that the lands described in plaintiff's complaint are a part of the lands above described. That at said time the said John Green, being a citizen of the United States and the head of a family and over 21 years of age, and had never bourne arms against the United States or given aid or comfort to its enemies, duly filed with the register and receiver of the United States land office at Oregon City, State of Oregon, his application for a homestead of said land above described under and by virtue of said act, and on the day of November, A. D. 1880, the said John Green, for the purpose of making said land a homestead under said act, entered upon and took possession of the same, and on the 18 day of December, A. D. 1883, the said John Green made before and filed with said land officers his affidavit required by said act, to the effect that he was the head of a family and over 21 years [Page 4.]

of age and a citizen of the United States, and that his application was made for his exclusive use and benefit, and that his entry was made for the purpose of actual settlement and cultivation and not either directly or indirectly for the use or benefit of any other person, and that he had not heretofore had the benefit of said act, and at the same time paid to said officers the fee of ten dollars provided by said act, and thereupon said officers permitted him to enter said lands as a homestead, and entered the same on the maps, plats, and records of their office. That on the 29th day of November, A. D. 1885, the said John Green made and filed with said register a notice of his intention to make his final proof of his said homestead, and thereupon the said register caused to be published and posted the notice required by said act of the time and place of making final proof of said homestead and the names of witnesses, and at the time mentioned in said notice, to wit, on the 11th day of January, A. D. 1886, the said John Green appeared before said officers of said land office at Oregon City, Oregon, and proceeded to introduce [Page 5.] and submit his evidence required by said act of his residence upon and cultivation of said land as a homestead for five consecutive years from the date of said entry, and said officers after duly considering said testimony or final proof did find and adjudge that the said John Green was at the time he made application for said land as such homestead a citizen of the United States over twenty-one years of age and the head of a family, and entitled to said land as such homestead; that he entered upon said land on the day of November, A. D. 1880, as such claimant, and continued to reside upon and cultivate the same for five consecutive years fro n said date in strict conformity with all the provisions of said act; that he had never borne arms against the United States or given aid or comfort to its enemies; that no part of his said homestead had been sold, contracted

for, or alienated; that said entry
was made for his own use and
benefit, and for the purpose of actual
settlement and cultivation, and not
either directly or indirectly for the [Page 6.]
use or benefit of any other person, and
that he had not heretofore had the
benefit of said act, and that he had
in all respects complied with all
the provisions of said act so as to en-
title him to a patent to said land,
and that he was therefore entitled to
a patent to said land as a homestead
claimant, and said officers thereupon
made and delivered to him a patent
certificate showing that he had compl-
ied with the provisions of said act and
had made final proof and was entitled
to a patent on the presentation to the
Commissioner of the General Land
Office said final certificate, and
said Green is now the owner of said
land and the holder of said certificate.
And defendants further allege that during
all the times mentioned in the compl-
aint the Yamhill Lumbering Company
was a corporation duly incorporated
under and by virtue of the general
incorporation laws of the State of Oregon
and having its place of business in
Yamhill County, State of Oregon, and that
these defendants were during all of
said time directors of said company [Page 7.]
and agents for the management of its
business.
That during the time the said John Green
was occupying said land as a homestead
as aforesaid, he sold from timber
growing on said land described in the complaint to the said Yamhill
Lumbering Company through these defen-
dants, as said directors and agents,
only eight hundred and forty-
six thousand
feet of logs, of which said logs 141,000 feet were cut prior to the said 11th day of January, 1886, and 705,000 feet were cut subsequent to said day, and subsequent to the issuance of said patent certificate as aforesaid, and that said logs
are the only logs or timber ever bought
by these defendants from timber on
said land described in plaintiff's complaint
and were not purchased by them as

individuals, but by them as agents
and directors of said company for
said company, and that these logs
and timber are the same logs and
timber mentioned in the complaint.
That the value of said timber is only
15 cts. per thousand feet. [Page 8.]
And the defendants for a further
and separate answer and defense
alleges that on the day of November,
A. D. 1880, and prior thereto said land,
described as follows, to wit, the north
half of the northeast quarter and the
east half of the northwest quarter of
section 30, in T. 3, S., R. 5 W., in,
Yamhill County, State of Oregon, was un-
occupied public lands of the United
States, and subject to homestead entry.
That the land described in plaintiff's
complaint is a part of the land above
described. That at said date the said
John Green, being a citizen of the United
States, and the head of a family and
over twenty-one years of age, and had
never borne arms against the United
States, or given aid or comfort to
its enemies, under and by virtue of
the act of Congress of May 20th, 1862, duly
filed his application in the United States
land office at Oregon City, State of Oregon, and
with the register and receiver thereof, for
a homestead of the lands above described;
and on the first day of November, A. D. 1880,
the said John Green entered upon and
took possession of said land as said [Page 9.]
homestead claimant under said act.
That thereafter, to wit, on the day of
November, A. D. 1880, the said John Green
made before and filed with the said
register and receiver his affidavit requi-
red by said act, to the effect that he was,
the head of a family, a citizen of the United
States, and over twenty-one years of
age, and that his said application was,
made for his exclusive use and benefit,
and that his entry was made for the
purpose of actual settlement and
cultivation, and not either directly
or indirectly for the use or benefit,
of any other person, and that he had
not heretofore had the benefit of said

act, and at said time paid to said officers the sum of ten dollars provided by said act, and said officers thereupon permitted said Green to enter said land as a homestead, and entered the same upon the maps and plats and records of said office. That said John Green at said time entered upon and took possession of said land as a homestead claimant and continued to reside upon and cultivate the same in accordance with [Page 10.]
the provisions of said act from said date till the day of January, A. D. 1886, being five consecutive years, and on said day of January, A. D. 1886, the said John Green, pursuant to the notice required by said act, appeared before said register and receiver, and by two credible witnesses proceeded to make his final proof of residence and cultivation, as required by said act, and having filed and submitted his evidence as final proof of his homestead the said officers of said land office proceeded to examine and approve the same, and then issued and delivered to said Green a final patent certificate showing that the said Green had resided upon and cultivated said land in accordance with all the provisions of said act as a homestead, and had made his final proof, and that said Green was entitled to a patent to said land. And defendants allege that during all the times named in the complaint the Yamhill Lumbering Company was a corporation duly incorporated under and by virtue of the general incorporation laws of the State of Oregon, and that these [Page 11.]
defendants were directors and agents of said company, and managers of its business. That during the time said John Green was in possession of said land as a homestead he sold to said Yamhill Lumbering Company, through these defendants as directors and agents of said company eight hundred and forty-six thousand feet of saw logs made from timber growing upon said land described in the complaint and

that these logs or timber are the same
that are mentioned in the complaint, and
in the first separate defense herein
pleaded, and are the only logs or
timber ever bought by these defendants
from said John Green either as indi-
viduals or as such directors and
agents of said company from timber
growing upon said land described in the complaint, and
that said timber out of which said logs were
made was cut down on said land
by said Green for the purpose of clearing
said land in good faith and for the
purpose of rendering said land fit and
suitable for cultivation and agriculture,
and said timber would have been burnt
up and destroyed unless sold as aforesaid [Page 12.]

And defendants allege that said timber
or logs was only of the value of 15 cts.
per thousand or in the aggregate of
the value of $126.50. And defendants
allege that during the time the said
John Green was in possession of
said land as a homestead claimant
he made improvements thereon, consisting
of a house, barn and outhouses, and
fencing, of the value of eight hundred
dollars, and done and performed
everything and act required of him
in regard to said homestead, by said
act of Congress, so as to entitle him
to a patent to the same. [Page 13.]

And the said defendants for a further
and separate answer and defense alleges
That on the day of November, A. D. 1880,
said John Green went upon and took
possession of the said described land,
to wit: The north half of the northeast
quarter and the east half of the northwest
quarter of section thirty, T. 3 S., R. 5 W., in
Yamhill County, State of Oregon, as a claimant
thereof under and by virtue of the provisions
of the act of Congress of May 20th, 1862,
commonly known as the homestead law,
and duly made his application to the
register and receiver of the United States
land office at Oregon City, Oregon, therefor.
That at and during said time the said
tract of land was unoccupied public
land of the United States and
subject to entry at said land office

under and by virtue of said act.
That said land above described includes the land described in plaintiffs complaint. That at said time said John Green was a citizen of the United States; the head of a family; over twenty-one years of age, and had never bourne arms against the United States, nor given aid or comfort to its enemies. [Page 14.]

And the said John Green at said time made before and filed with said officers his affidavit stating the facts last above described, and the further facts that said entry was made and said land taken for his own exclusive use and benefit and not either directly or indirectly for the use or benefit of and other person and was for the purpose of actual settlement and cultivation. That said John Green thereupon paid said officers the fee of ten dollars required by said act, and they thereupon permitted him to enter said land as a homestead under said homestead law and duly entered and marked said entry upon the maps and plats and records of their office.
That on the day of January, A. D. 1886, the said John Green made his final proof of settlement upon and cultivation of said land as such homestead in accordance with the provisions of said act and said final proof was received and approved by said officers, and they thereupon issued to him a final patent certificate for said homestead [Page 15.]

That during all of the time herein named to wit, from the day of November, 1880, until the 11th day of January, 1886, the said John Green resided upon and cultivated the said tract of land and claimed and represented to these defendants that he was residing upon and cultivating the same in good faith as a homestead in strict accordance with all the provisions of said act, and that he was cutting and disposing and removing the timber on said land for the purpose of clearing the same for agriculture, and cultivation of the same and for no other purpose, and these

defendants from the acts and conduct
of said John Green believed the said statements
and representations made by him, and
that he was complying in all respects
with the said homestead law and was
cutting and removing said timber
for the purpose of agriculture and cul-
tivation only, and that it was nec-
essary to cut and remove the said
timber for said purpose.
That during all the times named in the
complaint the Yamhill Lumbering
Company was a private corporation [Page 16.]
duly incorporated under and by virtue
of the general incorporation laws
of the State of Oregon, and that these def'ts
were its directors and managers of
its business; and, as such directors
and agents only, they were induced by
said facts and representations, above
set forth on the part of said John Green,
to buy for said Yamhill Lumbering
Company from the said John Green
eight hundred and forty-six thousand
feet of logs made from said timber cut
from off said land described in the complaint for the
purpose of clearing the same as aforesaid, and
that in the purchase of said timber as
aforesaid these defendants acted in
good faith, believing that the same was remov-
ed by said Green for the purpose only of
clearing said homestead and rendering it
fit for cultivation, and that it was
necessarily removed for that purpose.
That said timber so purchased from
said John Green was only of the value
of fifteen cents per thousand feet.
And that said timber and logs described
in this separate defense are the same
described in the first and second. [Page 17.]
separate defenses plead in this
answer, and the same logs and
timber referred to in plaintiff's
complaint.
Wherefore the said defendants ask
judgment that this action be dismissed.

H. HURLEY & KELLY & FRAZER,
Atty's for Def'ts.

STATE OF OREGON,
County of Yamhill, ss:

I, William Ball, being duly sworn, depose and say that I am one of the defendants above named, and that I believe the above answer to be true.

WM. BALL.

Subscribed and sworn to before me this 19 day of March, A. D. 1887.

H. HURLEY,
[SEAL.] *Notary Public for Yamhill County, Oregon.*

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within answer is hereby accepted at Portland, Oregon, this 21st day of March, 1887, by receiving a copy thereof, duly certified to as such by H. Hurley, of counsel for def'ts.

LEWIS L. MCARTHUR,
Attorney for Plaintiff.

(Endorsed:) Filed Mar. 21, 1887. R. H. Lamson, clerk. [Page 18.]

And afterwards, to wit, on the 29th day of April, 1887, there was duly filed in said court a motion to strike out parts of answer in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL, HENRY M. DANIEL, AND W. S. Powell. } No. 1351.

Motion to strike out parts of answer.

Comes now the plff., by L. L. McArthur, U. S. attorney for the district of Oregon, and moves the court to strike from the defendant's answer all that part thereof commencing with the word "That" on line 17, page 8, and ending with the word "feet" on line 9, page 9, for the reason that the same is frivolous and irrelevant.

And further moves the court to strike from the defendant's answer all that part thereof commencing with the word "Defendants" on line 12, page 12, and ending with the word "aforesaid" on line 24, page 13, for the reason that the same is frivolous and irrelevant.

And further moves the court to strike from the defendants' answer all that part thereof commencing with the word "That" on line 23, page 17, and ending with the word "cause" on line 1, page 19, for the reason that the same is frivolous and irrelevant.

And of the matters referred to in this motion, the plaintiff prays the judgment of the court.

LEWIS L. MCARTHUR,
U. S. Attorney.

STATE OF OREGON,
County of Multnomah ss:

Due service of the within motion is hereby accepted at Portland, Oregon, this 29 day of April, 1887, by receiving a copy thereof, duly certified to as such, by L. L. McArthur, counsel for plff.

JAMES K. KELLY,
Attorneys for Defts.

(Endorsed:) Filed April 29, 1887. R. H. Lamson, clerk.

35 And afterwards, to wit, on Monday, the 9th day of May, 1887, the same being the 15th judicial day of the regular April term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

36 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES *vs.* WILLIAM BALL, HENRY M. DANIEL, AND W. S. Powell.	No. 1351. May 9, 1887.

This cause was heard upon the motion to strike out parts of the answer herein, and was argued by Mr. L. L. McArthur, United States attorney, and by Mr. H. Hurley, of counsel for the defendants. On consideration whereof, it is ordered that said motion be and the same is hereby denied.

37 And afterwards, to wit, on the 9th day of June, 1887, there was duly filed in said court a demurrer to part of answer in words and figures as follows, to wit:

38 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES *vs.* WILLIAM BALL, HENRY M. DANIEL, AND W. S. Powell.	No. 1350.

Demurrer to 1st separate answer, &c.

Comes now the pl'ff and demurs to the first further and separate answer and defense in the defendants' answer contained, and for cause of demurrer alleges that the facts therein stated do not constitute a defense to the cause of action set forth in the complaint or any part thereof.

And of this demurrer the pl'ff prays the judgment of the court.

L. L. MCARTHUR,
U. S. Attorney.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within demurrer is hereby accepted at Portland, Oregon, this 9 day of June, 1887, by receiving a copy thereof, duly certified to as such by L. L. McArthur, counsel for pl'ff.

A. L. FRAZER,
Of Attorneys for Defendants.

(Endorsed:) Filed June 9, 1887. R. H. Lamson, clerk.

And afterwards, to wit, on Friday, the 5th day of August, 1887, the same being the 57th judicial day of the regular April term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to-wit:

40 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, *vs.* WILLIAM BELL, HENRY M. DANIEL, AND W. S. Powell.	No. 1351. August 5, 1887.

This cause was heard upon the demurrer to the first defense set up in the answer herein and upon the motion to strike out parts of said answer, and was argued by Mr. Lewis L. McArthur, United States attorney, and by Mr. H. Hurley and Mr. Arthur L. Frazer, of counsel for the defendants. On consideration whereof it is ordered that said demurrer be and the same is hereby overruled, and that said motion be and the same is hereby disallowed.

41 And afterwards, to wit, on the 5th day of August, 1887, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

42 United States circuit court, district of Oregon.

[Friday, August 5, 1887. The United States v. William Ball and Henry M. Daniel—No. 1350. Action to recover damages for conversion of timber.]

(1) *Homestead—Cutting timber thereon.*—A settler on the public lands under the homestead act, pending his residence thereon, and prior to the issue of a final certificate, is like a person in possession under an uncompleted contract of purchase, and he is not authorized to cut or remove timber therefrom, except for the purpose of preparing the land in the ordinary way for tillage, but if he does cut and remove timber therefrom for export and sale merely, and afterwards obtains a certificate from the register and receiver of his compliance with the law as such settler, the United States can not thereafter maintain an action against him for damages for cutting such timber, nor against any one to whom he may have disposed of the same for the conversion thereof.

DEADY, *J.:*

This action is brought by the United States to recover damages for the conversion of timber alleged to have been cut from the public lands in Yamhill County. It is alleged in the complaint that on January 1, 1881,

and on divers days thereafter and prior to February 1, 1884, John W. Green unlawfully cut from the public lands, designated in the surveys thereof as the northeast quarter of the northeast quarter and the southeast quarter of the northwest quarter of section 30, in township two, south of range five, west of the Wallamet meridian, 840,000 feet of growing timber and made the same into saw-logs, which he removed to the defendants' saw-mill in Yamhill County; that the defendants, well knowing the premises, took possession of said logs and manufactured them into lumber, which they converted to their own use, to the damage of the plaintiff in the sum of $6,720.

The answer of the defendant contains three defenses, the first of which is demurred to by the plaintiff.

In effect the defense is that in November, 1880, said Green, being qualified to enter land under the homestead act, took possession of the north half of the northeast quarter and the east half of the northwest quarter of the section aforesaid, and filed his affidavit in the proper land office as a settler thereon under said act, and paid the fees required by law; that in January, 1886, he made his final proof of compliance with said act before the proper register and receiver, who thereupon made and delivered to him a final certificate to that effect, and that he is entitled to a patent for the land; that the defendants bought 239,680 feet of logs of said Green, which were cut off said homestead during the time he occupied the same under the act, and that said logs are a part of those mentioned in the complaint, and were only worth 15 cents per 1,000.

On the argument of the demurrer counsel for the plaintiff cited U. S. v. Minor (114 U. S., 233) to prove that the United States are not precluded by the proceedings before the land officers under any of the various acts for the disposition of the public lands to settlers thereon, to show that such officers have, by the falsehood or fraud of the applicant, been imposed on and induced to give him a final certificate in a case where he was not entitled to the same, while counsel for the defendant cite and rely on Smith v. Ewing (23 Fed. Rep., 741) to prove that such certificate can not be questioned or set aside, except on a direct proceeding.

But no question of this kind arises here. Under any circumstances the certificate is at least prima facie evidence of the facts and conclusions stated therein. Neither does U. S. v. Minor countenance the idea that the certificate is subject to a collateral attack, but can only be set aside or overcome by a suit in equity instituted for that purpose.

The demurrer to the defense in this case admits the facts stated therein, the gist of which is that Green entered the premises under the homestead act, and having duly performed the subsequent conditions required by the same, and made due proof thereof, he received, in due form, a certificate to that effect from the register and receiver of the proper land office.

A settler on the public lands under the homestead act must reside on and cultivate the same for five consecutive years before he is entitled to a certificate. § 2291, R. S. In the mean time the legal title to the land and the timber thereon is in the United States, and the occupant is not entitled to cut or remove any timber therefrom, except as allowed by § 4 of the act of June 3, 1878 (20 Stat., 90), which provides in effect that an "agriculturist" on the public land—a homesteader or pre-emptioner—shall not cut or remove timber therefrom, except in the ordinary preparation of his "farm for

tillage "—the manifest meaning of which is that the timber shall not be cut for the sake of the timber, but for the improvement of the land. And this implies that the cutting and tillage shall not be far apart—that the plow must follow the axe. U. S. v. Williams, 9 Saw., 377.

In this matter the United States is to be regarded as any other vendor of real property, and the settler, prior to the issue of the certificate, as a vendee of such property, in possession under an uncompleted contract of purchase.

A person who goes into possession of real property under a contract of purchase and abandons or fails to comply with the same, is liable in trespass for the profits of the land or waste committed thereon during his occupation. 1 Wash. R. P., 377; Smith v. Stewart, 6 John., 46; Bancroft v. Wardwell, 13 John., 489.

But where a conveyance has been made to the vendee in pursuance of the contract of sale, or he has become entitled, by reason of compliance with the terms of such contract, to receive one, his right in and to the land relates back to the entry under the contract, and he can not be held liable to the vendor for any profits he may have received from the land or any waste committed thereon in the mean time, although the latter were of such a character as cutting and removing timber thereon, under circumstances that would have given the vendor a right in equity to an injunction to prevent the impairment of the value of the property pending the performance of the contract; and while it might, by the failure of the vendee, be thrown back on his hands. This, in my judgment, is the relation between Green and the United States since the issue of the final certificate. He has complied with his contract of purchase, so to speak, and has established the fact to the satisfaction of the officers designated by the law for that purpose, and is entitled to a patent for the premises. The right to a patent, as to the Government, is equivalent to one issued. Stark v. Starrs, 6 Wall., 418.

But it has been suggested that the defendants, having received this timber from the settler and converted it to their own use while the contract of purchase was only partly performed and the land belonged to the United States, they are liable therefor. Under the circumstances, they certainly took the chances of Green's complying with the law and obtaining the certificate. But if the performance of his contract and the issue of the final certificate relieves Green from liability for cutting and removing this timber when and as he did, it ought to prevent the United States from maintaining an action against his vendees for converting it to their use. Before the timber was cut the United States had disposed of the land to Green, and afterwards acknowledged the performance of the conditions of sale. The plaintiff has had pay for the timber once, and has no right to claim it again from these defendants.

If A takes B's horse and sells him to C, but afterwards pays B for it, the latter can not then maintain an action against C to recover the horse or its increase.

The effect of the whole transaction between Green and the United States is to establish the right of the former to the land and the timber thereon from the time of the entry in the land office; and all those who claim under him for either the land or timber are entitled to stand in his shoes.

There is an allegation tagged on to this defense to the effect that this timber was cut for the purpose of clearing the land for "agriculture," to which no attention has been paid. There is another defense in the case

founded on that fact. But this defense admits, in effect, that the timber was not cut primarily for the purpose of preparing the land for tillage, within the meaning of the proviso to section 4 of the act of 1878, but for the purpose of export and sale, and it is sustained on the theory that the subsequent compliance with the law under which the entry was made and the issue of the final certificate to that effect, makes Green in legal contemplation the owner of the land from the date of his entry, with a right to cut and dispose of the timber thereon as he saw proper. The demurrer is overruled.

The United States v. William Ball, Henry McDaniel, W. S. Powell. No. 1351. Action to recover damages for conversion of timber.

This action was brought on the same day with the foregoing one, to recover $8,250 damages for the conversion by the defendants of 2,750,000 feet of timber cut and removed by said Green from the premises aforesaid, between January, 1884, and January, 1887.

The answer of the defendants contains a defense similar to the one already considered, with the addition that the defendants, in purchasing the logs in question and manufacturing them into lumber, were acting as the directors and agents of the Yamhill Lumbering Company, a corporation formed under the laws of Oregon; and that only 846,000 feet of logs were so obtained by them—141,000 prior to January 11, 1886, when the final certificate was issued to Green, and 705,000 afterwards.

The demurrer to the defense is overruled for the reason already given.

Mr. Lewis L. McArthur for the U. S.
Mr. H. Hurley and Mr. Arthur L. Frazer for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Endorsed:) Filed Aug. 5, 1887. R. H. Lamson, Clerk.

43 And afterwards, to wit, on Friday, the 20th day of January, 1888, the same being the 69th judicial day of the regular October term of said court; present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

44 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL, HENRY M. DANIEL, and W. S. Powell. } No. 1351. January 20, 1888.

Now at this day comes the plaintiff, by Mr. Lewis L. McArthur, United States attorney, and the defendants, by Mr. Arthur L. Frazer, of counsel, and thereupon said defendants move the court for judgment herein upon the pleadings, and the plaintiff declining to further plead, but electing to stand upon its demurrer to and motion to strike out parts of the answer of said defendants, it is therefore considered that said plaintiff ought not to have or maintain this action and that the defendants go hence without day.

45 UNITED STATES OF AMERICA, *District of Oregon, ss:*

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record and of all the proceedings had in said court in the cause wherein The United States is the plaintiff and William Ball, Henry M. Daniel, and W. S. Powell are the defendants, No. 1351, as the same appears from the files and records of said court now remaining in my custody and under my control.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this 22nd day of March, 1888.

[SEAL.] R. H. LAMSON, *Clerk.*

(Indorsement on cover:) No. 359. The United States, plaintiff in error, *vs.* William Ball, Henry M. Daniel, and W. S. Powell. Oregon, C. C. U. S. Filed April 27, 1888.